



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Brenda Pomerance Confirmation: 7218  
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Serial No.: 09/543,049 Examiner: J. Hayes  
Title: AUTOMATED ALTERNATIVE DISPUTE RESOLUTION

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DECLARATION OF NORA FEMENIA

1. Since August 2002, I have been an Associate Professor of Conflict Resolution at the School for International Training, Kipling Road, P.O. Box 676, Brattleboro, VT 05302. From 1996-2000, I was an Assistant Professor, Department of Dispute Resolution, Nova Southeastern University, Fort Lauderdale, FL 33314. In 1997, I founded and became President of Inter-mediacion, Inc., Fort Lauderdale, FL, a company that provides research, training and consulting in the area of organizational conflicts; about 600 professionals, including lawyers, have paid to be trained by Inter-mediacion, Inc.
2. I am an arbitrator for the National Association of Securities Dealers (NASD), and in that capacity, I have served as a public arbitrator in about 12 arbitration procedures, and as the chair person of the arbitration tribunal in four arbitrations. I have been sole arbitrator in three arbitrations. I have served as a mediator in about 120 mediations. In 1993, I received a Ph.D. from Syracuse University, Maxwell School of Citizenship and Public Affairs, Program on Analysis and Resolution of Conflicts. I am skilled in the art of dispute resolution.
3. I have reviewed the following:
  - a. U.S. Patent No. 5,895,450 (Sloo),
  - b. the Online Resolution Press Release dated March 23, 2000, "Online Mediation Offered for Resolving E-Commerce Disputes" (OM), and
  - c. Eisen, Joel B., "Are we ready for mediation in cyberspace", Brigham Young Univ. Law Review, vol. 1998, no. 4, pp 1305-1358, 1998 (Eisen)
4. Sloo discloses a computer system that collects a complaint from a complainer (col. 4, lines 45 – col. 5, line 2) and delivers it anonymously to a target company (col. 6, lines 43-46). The complainer and target company can directly negotiate via email (col. 7, line 42

– col. 8, line 4), with the complainer remaining anonymous (col. 5, lines 12-19). The complainer can request that the complaint be decided by a third party (col. 8, lines 5-49) or the computer system (col. 9, line 57 – col. 10, line 14). Sloo's system collects information about who the complainer is merely to prevent wrongful use of the complaint system (col. 4, lines 55-60). In short, Sloo's computer system collects a complaint from a complainer, enables anonymous direct negotiation and allows the complainer to request arbitration of the complaint.

5. OM is directed to an online mediation system wherein a complainer fills out a form and emails it to the Mediation Information and Resource Center's website. The Center contacts the other party, and if the other party agrees to mediation, the Center selects a human mediator who conducts a mediation between the parties using email, instant messaging and group discussions, at a rate of \$50-100 per hour (paragraph bridging pages 1-2).
6. I first met John Helie, quoted in OM, in 1997. At professional conferences, Mr. Helie has stated his belief that an online system will help channel emotions out of mediation, since a computer is unaware of emotions. Mr. Helie has urged an online system that manages processing of factual information, to eliminate emotions from mediation.
7. Eisen argues that an online setting, in which all email is assumed to pass through a human mediator, is not suitable for mediation as it hampers mediators' face-to-face skills such as listening and processing oral information (page 1, bottom; page 3, second paragraph).
8. While arbitration and mediation are both techniques for dispute resolution, the role of an arbitrator is quite different than the role of a mediator. Arbitration and mediation differ in the amount of control left in participants' hands, retaining self-determination in mediation, while relying on the arbitrator's decision in arbitration. For example:
  - a. an arbitrator must not have private discussions with any of the parties to the dispute, whereas a mediator routinely has private meetings with each of the parties;
  - b. an arbitrator's purpose is to provide a decision that resolves the dispute, whereas a mediator's purpose is to help the parties craft their own solution;

- c. an arbitrator ends the arbitration by providing a decision, whereas a mediator can end a mediation with the dispute remaining unresolved;
  - d. arbitration is generally binding, whereas mediation is not; and mediation can be covenanted as many times as necessary according to parties' need;
  - e. if a party serves as mediator to a dispute, the party should decline to serve as arbitrator as a matter of professional responsibility, unless the parties agreed in advance to use "med-arb"
- 9. One of ordinary skill in the art of mediation considers mediation to be an art, with mediators conducting mediations according to their own personal styles.
- 10. One of ordinary skill in the art of arbitration considers arbitration to be akin to an adversarial court judgment but with less formal evidentiary rules and hopefully faster than a court action.
- 11. One of ordinary skill in the art of dispute resolution would not combine Sloo and OM. Since mediation techniques are so different than arbitration techniques, one of ordinary skill in the art would not try to combine the teachings of OM, relating to mediation, with those of Sloo, relating to arbitration. To a dispute resolver of ordinary skill, either the parties wish to retain decision control or wish to have a third party make a decision, and this determines which of mediation or arbitration will occur.
- 12. One of ordinary skill in the art of dispute resolution would not combine Sloo and Eisen. Since mediation techniques are so different than arbitration techniques, one of ordinary skill in the art would not try to combine the teachings of Eisen, relating to mediation, with those of Sloo, relating to arbitration.
- 13. Even if Sloo and OM could be combined, the resulting combination would not include a computer system that collects the emotional state of a complainer. If Sloo and OM had to be combined, a dispute resolver having ordinary skill in the art of dispute resolution would either:
  - a. modify Sloo's email direct negotiation to be an online mediation in which the mediator manages the emotional status of the parties using his or her own personal techniques, or

- b. create a procedure similar to “med-arb” where the dispute resolver deals with parties’ needs, but renders an impartial decision; in the case of med-arb, the disputants’ emotional state becomes irrelevant.
- 14. Even if Sloo and Eisen could be combined, the resulting combination would not include a computer system that collects the emotional state of a complainer. If Sloo and Eisen had to be combined, a dispute resolver having ordinary skill in the art of dispute resolution would either:
  - a. modify Sloo’s email direct negotiation to be an online mediation in which the mediator manages the emotional status of the parties using his or her own personal techniques, or
  - b. create a procedure similar to “med-arb” where the dispute resolver deals with parties’ needs, but renders an impartial decision; in the case of med-arb, the disputants’ emotional state becomes irrelevant.
- 15. One of ordinary skill in the art of dispute resolution would not modify Sloo’s system so that the complainer is named (non-anonymous) to the target of the complaint. Protecting privacy and confidentiality is paramount in conflict resolution, so parties can freely express their complaints. For Sloo, complainer anonymity is important to overcome the problem of private complaint systems not informing other consumers about complaints (col. 1, lines 17-25). Sloo, as is, enables complainers who want to be known to the target to reveal their identity in email direct negotiation. Sloo deliberately chose to provide for anonymous complaining in contrast to the prior art, and to a dispute resolver of ordinary skill, named complaining would destroy the essence of Sloo’s system.
- 16. One of ordinary skill in the art of dispute resolution would not modify Sloo’s system to suggest a remedy to a complainer during filing of the complaint. Dispute resolution systems are based on the premise of parties’ self-determination and ability to find their own solutions, if given the opportunity. Sloo’s “Automated Decision Maker” enables a complainer to determine the likely computer-generated decision of a dispute before filing a complaint (col. 10, lines 48-52 and col. 11, lines 21-36), so enhancing the complainer’s possible solution choices with feedback. To one of ordinary skill in the art of dispute resolution, changing Sloo so that the computer suggests a remedy to the complainer during complaint filing would change Sloo’s fundamental dynamics from a direct

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BRENDA 5

negotiation/arbitration system to an imposed solution system. The core of a disputant's power to progress through the stages of dispute resolution involving a negotiation would be eliminated by thus changing Sloo, which fundamentally changes Sloo's system from a dispute resolution system to a solution selection system that does not respect individual decision making, and this is a key difference to a dispute resolver of ordinary skill in the art.

I hereby declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Title 18 of the United States Code, Section 1001, and that such willful false statements may jeopardize the validity of the application or any patent issued thereon.

Feb 16, 2004  
Date

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